

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: _____ DATE FILED: <u>September 11, 2009</u>
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
KAHENE PETERKIN,

Plaintiff,

- against -

DR. HALKO, NA HENSON, P.A. WILLIAMS,

Defendant.
-----X

08 Civ. 8428 (PAC) (DFE)

ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

Pro se Plaintiff Kahene Peterkin (“Peterkin”), an inmate in the custody of the New York State Department of Correctional Services (“DOCS”), brings this action against Defendants Dr. Halko, NA Henson, and P.A. Williams. Peterkin’s Complaint alleges that while he was incarcerated at Sing Sing Correctional Facility: (1) Dr. Halko denied him medications he had received at his previous correctional facility for a variety of physical ailments, including a herniated disc, back pain, and neck pain; and (2) he was forced to sleep in a top bunk even though his physical condition entitled him to a bottom bunk, and on July 20, 2008, he fell out of his top bunk and injured himself.

On November 20, 2008, this Court referred the matter to Magistrate Judge Douglas F. Eaton for general pretrial, including dispositive motions. On January 8, 2009, Peterkin moved for the appointment of counsel. On January 22, 2009, Defendants Halko and Williams moved to dismiss Peterkin’s Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).¹

¹ According to Defendants Halko and Williams, Defendant Henson was not served and therefore did not join in the motion to dismiss. (See Def. Mem. in Support of Motion to Dismiss (“Def. Mem.”) at 1 n.1.)

Magistrate Judge Eaton issued a Report & Recommendation (“R&R”) on May 5, 2009. First, Magistrate Judge Eaton denied Peterkin’s motion for the appointment of counsel on the grounds that the merits of Peterkin’s claim were poor and his chances of prevailing were minimal. (R&R at 1.) Second, Magistrate Judge Eaton recommended that the Court grant Defendants’ motion to dismiss because Peterkin had failed to exhaust his administrative remedies, as he was required to do under the Prison Litigation Reform Act of 1995 (“PLRA”). (*Id.* at 2-8.) Based upon a thorough examination of the record, Magistrate Judge Eaton determined that Peterkin never filed a grievance indicating that he was denied medication, and failed to exhaust all administrative remedies with respect to the grievance he filed concerning his bunk assignment. (*Id.*) Magistrate Judge Eaton provided the parties with 10 days from the date of service of the R&R in which to file objections, and advised that “[f]ailure to file objections within 10 business days will preclude appellate review.” (*Id.* at 8.)

Neither party has filed objections.² “To accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record.” Wilds v. United Parcel Serv., 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003). Having reviewed the record and found no clear error, the Court adopts the R&R in its entirety. Peterkin’s motion to appoint counsel is DENIED. Defendants’ motion to dismiss is GRANTED, and the Complaint is

² On July 1, 2009, Magistrate Judge Eaton received a letter from Peterkin dated June 26, 2009, in which Peterkin suggests that the Supreme Court’s decision in Haywood v. Drown, __ U.S. __, 129 S.Ct. 2108 (2009) “will [] alleviate me of one of the main grounds for a dismissal in the defendants motion.” (Letter from Kahene Peterkin to Magistrate Judge Douglas F. Eaton dated June 26, 2009, Docket #20.) The Court does not accept this letter as an objection to the R&R. First, the letter was received well after the deadline for objections, which the R&R clearly identified as “no later than May 22, 2009.” (R&R at 8.) Second, it is clearly aimed at a ground for dismissal—i.e., that Halko and Williams are immune from suit in their official capacities under the Eleventh Amendment—that is raised in Defendants’ papers but that is not addressed in the R&R. (See Def. Mem. at 10-11.) Haywood has no bearing on the issue of whether Peterkin exhausted his administrative remedies as required by the PLRA.

DISMISSED with leave to renew after Peterkin exhausts his administrative remedies.

The Clerk of the Court is directed to close this matter.

Dated: New York, New York
September 11, 2009

SO ORDERED



PAUL A. CROTTY
United States District Judge

Copies mailed to:

Hon. Douglas F. Eaton
United States Magistrate Judge

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